The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2019

PHILADELPHIA, FRIDAY, NOVEMBER 8, 2019 VOL 260 • NO. 92 An ALM Publication

ENVIRONMENTAL LAW

Environmental Groups, State AGs Challenge Endangered Species Act Revisions

BY RODD W. BENDER AND MEGAN A. ELLIOTT
Special to the Legal

On Aug. 27, final revisions to the federal Endangered Species Act's implementing regulations were published by the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively, the Services). The Endangered Species Act (ESA) and its accompanying regulations and guidance have not undergone many changes since the law's 1973 enactment. The Trump administration promulgated these changes to align the ESA program more closely to the administration's goals of reducing regulatory constraints and increasing transparency. According to Commerce Secretary Wilbur Ross, the changes "fit squarely within the president's mandate of easing the regulatory burden on the American public, without sacrificing our species' protection and recovery goals." As with many environmental policy developments in this current political atmosphere, however, public reaction has been split—many members of the regulated community have welcomed the changes, while environmental groups and several state attorneys general have sued the administration to overturn the rulemaking.

The ESA was enacted to aid in conservation of threatened and endangered plants and animals by providing them (and their critical habitats) with certain protections. According to the USFWS's website, the ESA has prevented extinction for 99% of the species it protects. Among others, the ESA has protected several species previously at risk of extinction such as the humpback whale, grizzly bear and bald eagle.

BENDER

ELLIOTT

RODD W. BENDER *and* **MEGAN A. ELLIOTT** *are attorneys at the environmental, energy and land use law and litigation firm Manko, Gold, Katcher & Fox, located in suburban Philadelphia. Contact them at 484-430-5700 or at rbender@mankogold.com or melliott@mankogold.com.*

> *"Even if listed species currently occupy only a small portion of their historical habitat they will require additional area to expand in order to recover, and also to relocate as habitat is impacted by climate change."*

Under the ESA framework, if a species is believed to be at risk for extinction, interested parties may petition the USFWS or NMFS (that have jurisdiction over different types of species) for "listing," which triggers an agency review to determine whether the species is at risk due to any of the following factors: present or threatened destruction, modification or curtailment of its habitat or range; overutilization for commercial, recreational, scientific or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; or other natural or man-made factors affecting its survival. If the species is determined to be at risk, the agency then adds it to either the endangered species list, which means that it is in danger of extinction throughout all or a significant portion of its range, or the threatened species list, which means that it is likely to become endangered in the foreseeable future throughout all or a significant portion of its range. The ultimate goal of both lists is to enable species to reestablish themselves and therefore be removed from protected status.

The recent changes primarily involve four significant revisions to the ESA implementing regulations:

- Eliminating language that prohibited the Services from considering economic impacts when making listing determinations.
- Establishing a new regulatory framework for the phrase "foreseeable future" in evaluating proposed threatened species.
- Defining protections for species on the threatened list on a case-by-case rather than blanket basis.
- Revising the process and standard for designation of unoccupied critical habitat.

CONSIDERATION OF ECONOMIC IMPACTS

Before the recent rule changes, the ESA regulations required that the Services base their decision on whether to list a species as threatened or endangered on the best currently available scientific and commercial data "without reference to possible economic or other impacts of such determination." Under the newly revised regulations, this "economic impacts" clause has been removed. Some have interpreted this deletion to mean that the Services are now permitted to consider economic impacts when making listing determinations.

The Services have denied that interpretation. In a response to public comment on the proposal, the Services stated that the deletion "does not signal any difference in the basis upon which listing determinations will be made" and that the Services "remain committed to basing species' classification-decisions on the best available scientific and commercial data ... without considering economic or other impacts when making these decisions." The Services have also stated that economic data may be evaluated for informational purposes, and removing this prohibition creates more transparency in this process. Environmentalists, however, fear that this change may open the door to basing listing decisions on economic factors.

DEFINITION OF FORESEEABLE FUTURE

As noted above, a threatened species is "any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The phrase foreseeable future was previously undefined. In the revised regulations, this phrase has been defined so as to extend "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely."

In response to this change, several commenters raised concerns that under this framework "the Services would consider climate change as a hypothetical and not a 'probable' threat or would otherwise ignore the best available science on climate change." The Services rejected that criticism, stating that they will continue to consult the best available science. Nevertheless, environmental organizations caution that this change may give the Services too much discretion to accept or reject climate science in making threatened species determinations.

LOSS OF BLANKET PROTECTIONS FOR THREATENED SPECIES

Section 9 of the ESA prohibits the "taking" of endangered species. To take means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 9 also includes several other protections for endangered species, including prohibitions on importing, possessing or selling an endangered species.

Previously, USFWS had automatically extended these protections to species on the threatened list as well, a practice known as providing threatened species with "blanket rules." Under the revised regulations, USFWS is discontinuing the use of the blanket rules for threatened species,and instead will issue species-specific rules when it makes final determinations on threatened species listings or reclassifications. This change puts USFWS in line with NMFS, which already had not extended blanket protections to threatened species. Supporters of this change assert that it maintains an important distinction between the level of protection that may be needed for endangered versus threatened species. Opponents, conversely, contend it will increase agency backlogs in developing conservation plans for threatened species.

DESIGNATION OF UNOCCUPIED CRITICAL HABITAT

In the last of these significant changes, the services are reverting to a two-step process for designating unoccupied critical habitat. Now (as was the case until 2016), when designating critical habitat, the Services will first evaluate areas that are currently occupied by the species. If the occupied critical habitat is found to be inadequate, then unoccupied critical habitat can be considered.

This change is designed to reflect the U.S. Supreme Court's holding in *Weyerhaeuser v. U.S. Fish & Wildlife Services*, 139 S. Ct. 361 (2018). There, the court held that "even if an area otherwise meets the statutory definition of unoccupied critical habitat" the Services cannot "designate the area as critical habitat unless it is also habitat for the species." To comport with that holding, the new rules include a requirement that, at a minimum, an unoccupied area must have one or more of the physical or biological features essential to conservation of the species in order to be considered potential critical habitat. The administration endorses this revision as reducing unnecessary regulatory burdens on habitat where species are not present. Critics contend, however, that even if listed species currently occupy only a small portion of their historical habitat they will require additional area to expand in order to recover, and also to relocate as habitat is impacted by climate change.

Taken together, proponents of these changes assert that they will ease unnecessarily stringent regulatory burdens hindering economic growth, while still upholding the ESA's mandate to conserve imperiled species. A coalition of environmental and animal rights groups, and attorneys general representing 17 states, strongly disagree with this assertion, having each filed litigation in California federal court asserting that the rulemaking conflicts with the language and mandate of the ESA and violates procedural requirements under the Administrative Procedure Act and National Environmental Policy Act. The outcome of these lawsuits, which will likely involve lengthy appeals, will play an important role in the degree to which the ESA continues to protect against loss of critical plants and wildlife. •

MANKO | GOLD
KATCHER | FOX LLP
AN ENVIRONMENTAL AND ENERGY LAW PRACTICE